DOD OFFICE OF THE GENERAL COUNSEL

IP STRATEGIES

(& MODULAR OPEN SYSTEMS APPROACHES)

DOD PERSPECTIVES

DAU Acquisition Training Symposium:
Strengthening Cost Consciousness, Professionalism, and Technical Excellence

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DISCLAIMER

The opinions expressed in this briefing are those of the author and do not necessarily represent, and should not be attributed to, the Department of Defense or the United States Government.

OVERVIEW

- **Introduction**
- **IP Strategies – *from cradle to grave***
- **Modularity, Segregability, and Open Systems Architectures . . . What's the difference?**
- **Evaluating IP in Source Selection**

Note: Additional details in the Backup Slides; plus bonus coverage re "segregation & reintegration" data

DOD'S BETTER BUYING POWER (BBP) 3.0 (HTTP://BBP.DAU.MIL/)

- **USD(AT&L)* memo, "Implementation Directive for [BBP 3.0] – Achieving Dominant Capabilities through Technical Excellence and Innovation,"** 09 Apr 15 (http://.../docs/BBP3.0ImplementationGuidanceMemorandumforRelease.pdf)
  - **New Emphasis Areas:**
    - Long-range research and development
    - Cybersecurity
    - **Commercial technology**
    - Prototyping and experimentation
    - **Modular Open System *Architectures* (read "*Approaches*") (MOSA)**
    - Global technology
    - Organic engineering capabilities
    - Science, Technology, Engineering and Mathematics (STEM) education
  - **Continuing from BBP 2.0:** "Enforce open system architectures and effectively manage technical data rights"
- **BBP 3.0 Fact Sheet:** http://bbp.dau.mil/docs/BBP3.0FactSheetFINAL.pdf

(Under Secretary of Defense for Acquisition, Technology, and Logistics)*

IP [& [M]OSA] -- MULTIPLE PARALLEL ACTIVITIES (SEE https://acc.dau.mil/oa)

- **DoD IP White Paper, "DoD, Innovation, and Intellectual Property in Commercial & Proprietary Technologies" (*https://acc.dau.mil/CommunityBrowser.aspx?id=737728*)**
  - See also Fact Sheet: *"Overview of Law, Regulations, and Policy for Licensing Technical Data (TD) and Computer Software (CS) to DoD" (*adapted version of the *"Data Rights Focus Sheet,"* below*)*

- **"Guidelines for Creating and Maintaining a Competitive Environment…" (21Aug14)**

- **Guidance: "Intellectual Property Strategy" brochure** (18 Sep 14)

- **The Data Rights Focus Sheet** (formerly "tri-fold", 30 Oct 14)

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- **DoD Open Systems Architecture Contract Guidebook (v1.1)**

- **Update DoD Issuances**
  - **DoD Instruction 5000.02 – mandating the IP Strategy**
  - Coming Soon! Updated: DoD 5010.12-M "Procedures for the Acq. & Mgmt of Tech Data,"

- **Integrated training – Defense Acquisition University (DAU)**
  - Defense Acquisition Guidebook Chapters 2, 4, 5, 7, 12
  - ONLINE - continuous learning modules

- **And don't forget – DFARS** under nigh continuous change, driven and responding to statutory churn, BBP evolution, lessons learned…

https://acc.dau.mil/OA

"VENDOR LOCK" – WHAT IS THAT?

- **Careful!! Everybody [loves/hates] a buzz-phrase**
  - **It depends . . .**

- **Term used in the official BBP 3.0 guidance? Nope.**
  - **But …** "remove barriers"; "competitive environment"; "incentivize"; "innovative"; "modular"; "technology insertion and refresh"; "affordable"; "life cycle costs"; "return on investment"

- **OSA Contract Guidebook (v1.1):** " "Vendor lock-in" or just "lock-in", is the situation in which customers are dependent on a single manufacturer or supplier for some product (i.e., a good or service), or products, and cannot move to another vendor without substantial costs and/or inconvenience. This dependency is typically a result of standards that are controlled by the vendor (i.e., manufacturer or supplier). It can grant the vendor some extent of monopoly power and can thus be much more profitable [for the vendor] than would be the absence of such dependency. [http://www.linfo.org/vendor_lockin.html referenced in http://cionii.defense.gov/sites/oss/Open_Source_Software_%28OSS%29_FAQ.htm]"

- ***But See*** ✉ **the first & second bullets**

- *Introduction*

IP Strategies – from cradle to grave

- *Modularity, Segregability, and Open Systems Architectures . . . What's the difference?*
- *Evaluating IP in Source Selection*

Note: Additional details in the Backup Slides; plus bonus coverage re "segregation & reintegration" data

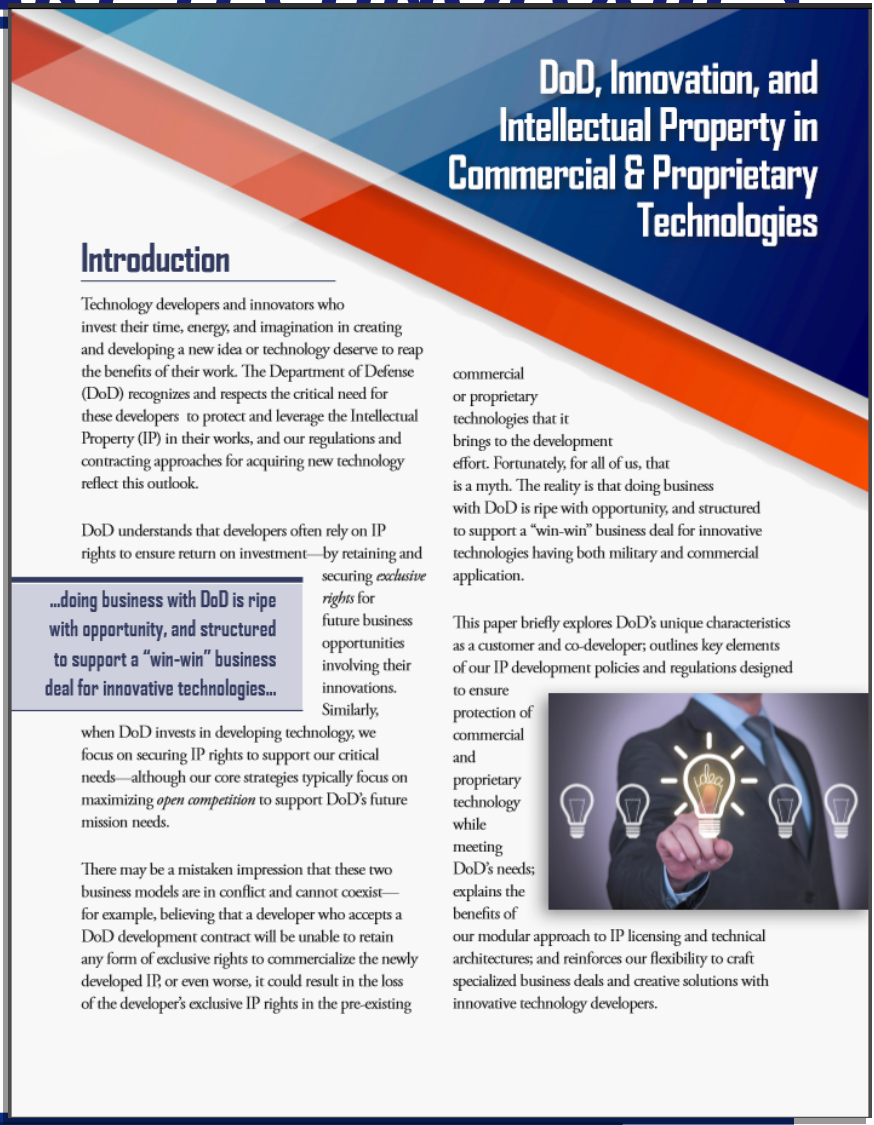
DODI 5000.02 – IP & OSA

- **DoD Instruction 5000.02, "Operation of the Defense Acquisition System," January 07, 2015** (http://www.dtic.mil/whs/directives/corres/pdf/500002p.pdf)

  - IP Strategy (IPS) required throughout entire program life cycle (see Encl.1 Table 2 (p.48); Encl 2, ¶ 6.(a)(4) (p.76))
  - Requires the IP acquisition planning elements of DFARS 207.106 (S-70) for ALL systems
  - Open Systems Architectures required when feasible & cost-effective; + IPS ✉ an "open business model" (Encl. 3, ¶14 (p.86))
  - Product support strategy must be consistent/integrated with IPS (Encl. 6, ¶2.a.(1)(a)5. (p.112);

DOD IP WHITE PAPER, "DOD, INNOVATION, AND IP IN COMMERCIAL & PROPRIETARY TECHNOLOGIES"

- Introduction
- DoD as a Customer, and Perhaps as a Co-Developer
- DoD's Approach to Protecting IP in Commercial & Proprietary Technologies
- Modularity to Preserve Commercial or Proprietary Interests
  - Modular Licensing (aka "Doctrine of Segregability")
  - Modular Open Systems Approach (MOSA)
- The Flexibility to Negotiate – In All Cases
- Opening the Dialogue



DoD, Innovation, and Intellectual Property in Commercial & Proprietary Technologies

Introduction

Technology developers and innovators who invest their time, energy, and imagination in creating and developing a new idea or technology deserve to reap the benefits of their work. The Department of Defense (DoD) recognizes and respects the critical need for these developers to protect and leverage the Intellectual Property (IP) in their works, and our regulations and contracting approaches for acquiring new technology reflect this outlook.

DoD understands that developers often rely on IP rights to ensure return on investment—by retaining and securing *exclusive rights* for future business opportunities involving their innovations. Similarly, when DoD invests in developing technology, we focus on securing IP rights to support our critical needs—although our core strategies typically focus on maximizing *open competition* to support DoD's future mission needs.

...doing business with DoD is ripe with opportunity, and structured to support a "win-win" business deal for innovative technologies...

There may be a mistaken impression that these two business models are in conflict and cannot coexist—for example, believing that a developer who accepts a DoD development contract will be unable to retain any form of exclusive rights to commercialize the newly developed IP, or even worse, it could result in the loss of the developer's exclusive IP rights in the pre-existing commercial or proprietary technologies that it brings to the development effort. Fortunately, for all of us, that is a myth. The reality is that doing business with DoD is ripe with opportunity, and structured to support a "win-win" business deal for innovative technologies having both military and commercial application.

This paper briefly explores DoD's unique characteristics as a customer and co-developer; outlines key elements of our IP development policies and regulations designed to ensure protection of commercial and proprietary technology while meeting DoD's needs; explains the benefits of our modular approach to IP licensing and technical architectures; and reinforces our flexibility to craft specialized business deals and creative solutions with innovative technology developers.

https://acc.dau.mil/CommunityBrowser.aspx?

DOD IP WHITE PAPER, "DOD, INNOVATION, AND IP IN COMMERCIAL & PROPRIETARY TECHNOLOGIES" (PAGES 2 & 3)

DoD as a Customer, and Perhaps as a Co-Developer

DoD leverages leading edge technologies to give our Warfighters an advantage over any potential future adversary. In a military context, we have practical and critical needs to ensure that defense capabilities can operate under adverse conditions, meet our safety objectives, are supportable and maintainable, and will be available in time of conflict. These defense-unique needs may drive the Department to seek specialized types of technical information or license rights, in some but not all cases. Those situations would not be relevant to a non-defense customer base.

DoD as a Customer

When any Government agency purchases a commercial technology, the foundational policy and practice is that the agency will receive only the same IP rights, and the same deliverables, that are typically provided to other commercial customers. If the usual commercial deliverables and licenses do not meet a Government-unique need, for example when technical information is needed to assess risk and mission impact or to maintain and support the system for a longer than usual operational life, then we would seek to negotiate with the commercial vendor for any specialized deliverables or IP rights—on voluntary, mutually acceptable, terms.

DoD as a Co-Developer

DoD's specialized mission requirements may also require further development to extend or adapt a commercial or proprietary technology to address particular operational challenges and threats. When DoD funds the development of new technologies, there are significant benefits for the developer: DoD almost never seeks ownership of the IP developed under a contract, even when funding 100% of the development; and for technology development funded jointly by DoD and Industry, the standard license rights provided in the DoD regulations allow the developer to retain *exclusive rights* for any *commercial* (non-Government) uses for the new technology.

DoD's Approach to Protecting IP in Commercial & Proprietary Technologies

When DoD acquires commercial or proprietary technologies developed *exclusively at private expense*, DoD's license will typically be either the same commercial license applied to other customers, or the predefined minimum license specified in the DoD regulations—which is limited primarily to internal DoD use, allowing for non-DoD third parties to use that IP only on behalf of DoD in specified, mission-critical or mission-support circumstances (e.g., emergencies, or direct support of DoD's in-house activities), and subject to numerous legal and practical safeguards to protect the developer's proprietary rights. The regulations provide additional protections for *commercial* technologies: DoD is required to presume that commercial items were developed exclusively at private expense, and generally to utilize the same deliverables customarily provided to the public; and DoD does not even have a unique clause for Commercial Computer Software, relying instead on the IP owner's standard commercial license. Exceptions are allowed only if necessary to comply with federal law or to meet military-unique mission needs (or by mutual agre ement).

When DoD seeks to meet its military-unique needs by *funding* a specialized adaptation or modification of pre-existing commercial or proprietary IP, any minor modifications or modifications of a type customarily offered in the commercial marketplace do not alter the commercial status of the pre-existing technology; and only those modifications that rise to the level of a new technology "development" could affect the standard license rights granted to DoD in the newly developed modification.

Modularity to Preserve Commercial or Proprietary Interests

In "mixed funding" development scenarios, such as when DoD funds a specialized modification of a commercial or proprietary technology, the developer may be concerned that it will lose its IP rights in the proprietary components by taking the DoD funding. However, DoD uses a two-part approach to ensure a mutually beneficial business deal:

Modular Licensing

When a technology is developed with a mix of DoD and Industry funds, DoD policy ensures that the developer's self-funded work can be segregated from the DoD-funded work, allowing separate licenses to govern each portion. This preserves the developer's IP rights to its self-funded portion, while allowing DoD to obtain greater rights to only those subsystems or components that it funded. This policy (the so-called "Doctrine of Segregability") protects the developer, ensuring that accepting DoD funding does not threaten the developer's exclusive IP rights or return on investment.

Modular Open Systems Approach

MOSA is primarily a technical approach for system design, which naturally facilitates a more effective approach to technical data and software deliverables, as well as modular licensing. MOSA helps preserve competition throughout the system life cycle without threatening a developer's proprietary IP—by enabling a "plug-and-play" approach for "black box" commercial or proprietary system components. More specifically, by leveraging open, standard, interfaces *between* those components, and seeking only top-level data (e.g., "form, fit, and function" and interface data), rather than detailed technical information, for proprietary components.

The Flexibility to Negotiate—In All Cases

If the ability to follow commercial practices, the standard funding-based license rights provided in the DoD regulations, and the application of MOSA and modular licensing principles still do not result in the best balance of DoD and the Developer's interests, the parties are *always* allowed to negotiate specialized terms by mutual agreement. In addition to crafting specialized IP licenses, the form, content, and level of detail of the technical data and software deliverables are also completely negotiable.

Opening the Dialogue

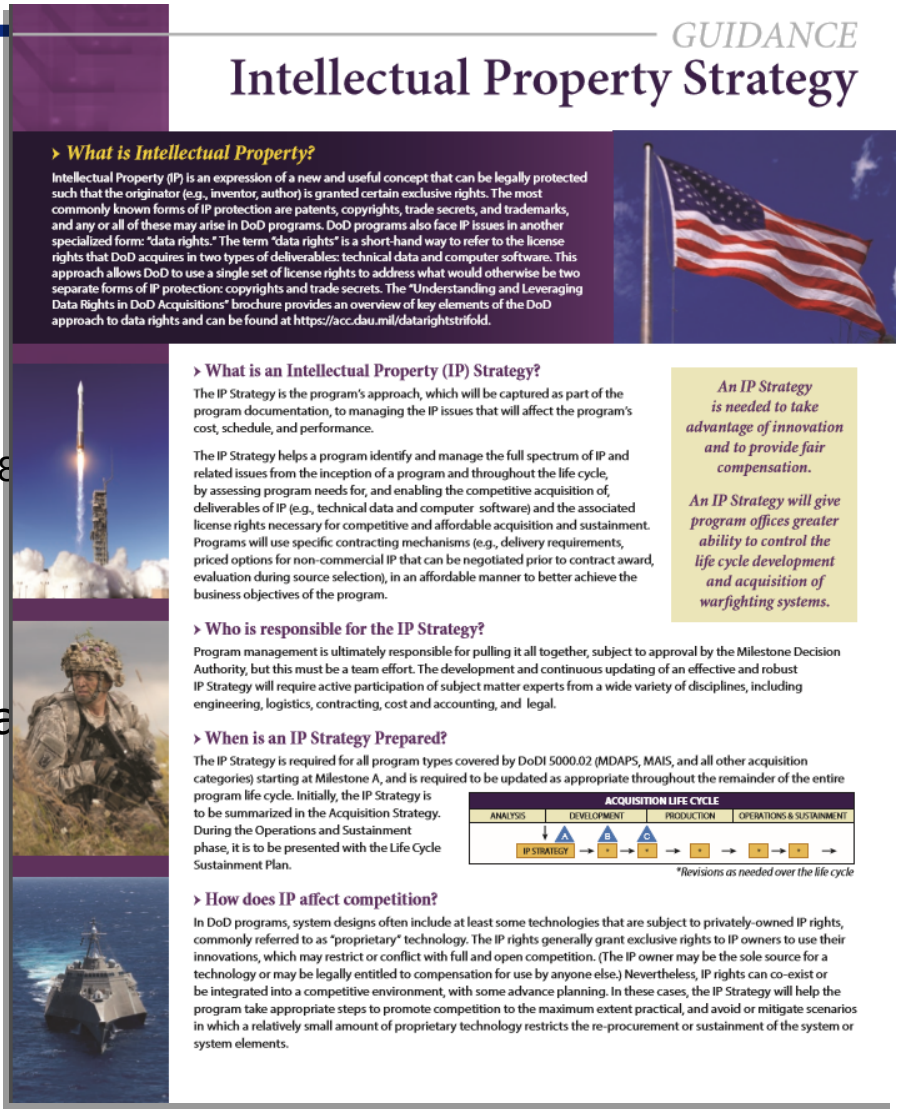
DoD is reaching out to technology developers to discuss and explore creative solutions to meet our National security needs through and mutually successful business arrangements. DoD respects the critical need for technology developers to ensure a return on their technology investments, particularly through their IP rights. Through early and open discussions about these key IP considerations, DoD hopes to refute myths about our business opportunities and find ways to improve our engagement with communities on the cutting edge of technology.

DoD hopes to find ways to improve our engagement with communities on the cutting edge of technology

IP STRATEGY GUIDANCE

- **One-stop shop:**
  - For now (08 Oct 14) – the IP Strategy guidance/brochure
  - Forthcoming – additional guidance, "focus sheets," etc.

- **IP Strategy Guidance Brochure** (18 Sep 14) (details ✉ next 5 slides)
  - The Basics: What, Who, When, Why, and How?
  - The Next Level: data delivery vs. data rights; time is of the essence; modularity, segregability, & OSA; the "R-P" and "O-C" Models
  - Guiding Principles for a *Strategic* Approach to IP Mgmt
  - IP Strategy Checklist



GUIDANCE

Intellectual Property Strategy

› What is Intellectual Property?

Intellectual Property (IP) is an expression of a new and useful concept that can be legally protected such that the originator (e.g., inventor, author) is granted certain exclusive rights. The most commonly known forms of IP protection are patents, copyrights, trade secrets, and trademarks, and any or all of these may arise in DoD programs. DoD programs also face IP issues in another specialized form: "data rights." The term "data rights" is a short-hand way to refer to the license rights that DoD acquires in two types of deliverables: technical data and computer software. This approach allows DoD to use a single set of license rights to address what would otherwise be two separate forms of IP protection: copyrights and trade secrets. The "Understanding and Leveraging Data Rights in DoD Acquisitions" brochure provides an overview of key elements of the DoD approach to data rights and can be found at https://acc.dau.mil/datarightstrifold.

› What is an Intellectual Property (IP) Strategy?
The IP Strategy is the program's approach, which will be captured as part of the program documentation, to managing the IP issues that will affect the program's cost, schedule, and performance.
The IP Strategy helps a program identify and manage the full spectrum of IP and related issues from the inception of a program and throughout the life cycle, by assessing program needs for, and enabling the competitive acquisition of, deliverables of IP (e.g., technical data and computer software) and the associated license rights necessary for competitive and affordable acquisition and sustainment. Programs will use specific contracting mechanisms (e.g., delivery requirements, priced options for non-commercial IP that can be negotiated prior to contract award, evaluation during source selection), in an affordable manner to better achieve the business objectives of the program.
An IP Strategy is needed to take advantage of innovation and to provide fair compensation.
An IP Strategy will give program offices greater ability to control the life cycle development and acquisition of warfighting systems.
› Who is responsible for the IP Strategy?
Program management is ultimately responsible for pulling it all together, subject to approval by the Milestone Decision Authority, but this must be a team effort. The development and continuous updating of an effective and robust IP Strategy will require active participation of subject matter experts from a wide variety of disciplines, including engineering, logistics, contracting, cost and accounting, and legal.
› When is an IP Strategy Prepared?
The IP Strategy is required for all program types covered by DoDI 5000.02 (MDAPS, MAIS, and all other acquisition categories) starting at Milestone A, and is required to be updated as appropriate throughout the remainder of the entire program life cycle. Initially, the IP Strategy is to be summarized in the Acquisition Strategy. During the Operations and Sustainment phase, it is to be presented with the Life Cycle Sustainment Plan.
ACQUISITION LIFE CYCLE
ANALYSIS
DEVELOPMENT
PRODUCTION
OPERATIONS & SUSTAINMENT
A
B
C
IP STRATEGY
*Revisions as needed over the life cycle
› How does IP affect competition?
In DoD programs, system designs often include at least some technologies that are subject to privately-owned IP rights, commonly referred to as "proprietary" technology. The IP rights generally grant exclusive rights to IP owners to use their innovations, which may restrict or conflict with full and open competition. (The IP owner may be the sole source for a technology or may be legally entitled to compensation for use by anyone else.) Nevertheless, IP rights can co-exist or be integrated into a competitive environment, with some advance planning. In these cases, the IP Strategy will help the program take appropriate steps to promote competition to the maximum extent practical, and avoid or mitigate scenarios in which a relatively small amount of proprietary technology restricts the re-procurement or sustainment of the system or system elements.

IP STRATEGY GUIDANCE

- **The Basics** (Page 1)
  - **What is Intellectual Property?**
  - **What is an IP Strategy?**
  - **Who is responsible for the IP Strategy?**
  - **When is an IP Strategy prepared?**
  - **How does IP affect competition?**

https://acc.dau.mil/IPstrategyguid

IP STRATEGY GUIDANCE

› It Takes Two: *Delivery Requirements and IP License Rights*

It is impossible to craft an effective IP Strategy without addressing the program's need for BOTH IP rights and IP deliverables. Using technical data and computer software as an example, the IP Strategy must assess and account for both the data rights granted to the government AND the data deliverables that are required by the contract. The data rights will be granted by standard DFARS clauses, or by applicable negotiated or commercial license agreements, but the data delivery requirements must be specified, case-by-case, in each individual contract. Failure to include delivery requirements cannot be cured merely by including "all the data rights clauses" in the contract. If there are no data deliverables, then there is no way for the Government to actually exercise its data rights. Moreover, the data deliverables and data rights for any particular technology must be managed together, like two sides of the same coin, in any given contract or program activity. Addressing one early, and deferring the other until later, is likely to put the Government at a disadvantage.

› Time is of the Essence: *Act Now for Future Flexibility*

One of the most significant challenges in managing IP issues over a program or system life cycle is the timing. IP rights are allocated early, at first development or first delivery of the technology, even though the Government's need to use or release the delivered data likely occurs later in the program life cycle, sometimes significantly later. Given the inherent challenges in predicting the future (e.g., what sustainment approach will we use?), and the immense pressures of today's fiscally constrained environment (e.g., deferring expenditures), the temptation is to "kick the can down the road" on IP issues. Programs must resist that temptation and make a cold, calculated, smart, business decision. Developing and regularly updating the IP Strategy will enable programs to forecast their downstream sustainment needs for data rights and to use the competitive environment early in the program life cycle to obtain competitive pricing for downstream activities.

› Be Prepared: *"Segregability," Modularity, and Open Systems Architecture*

Segregation Part I: *The Bad News*. Many DoD systems include a mix of commercial and noncommercial technologies, developed from various degrees of Government funding (none, mixed, or all). Contractors are allowed to assert data rights restrictions at the system, subsystem, component, or any other "segregable" level. This means that even a relatively small amount of privately-funded ("proprietary") technology may restrict the competition for a much larger piece of the system. A rigorous application of the rules can result in a daunting array of license categories and delivery models scattered throughout the system. However, this predictive analysis can be simplified by grouping the system into its various functional subsystems or modules. Then the resulting approach to managing the IP issues for each module can be analyzed as falling into one of the following two models:

The Restricted-Proprietary (R-P) Model	The Open-Competitive (O-C) Model
When EITHER the data rights OR the data deliverables do not allow the data to be used or released for competitive life cycle activities.	When BOTH the data rights AND the data deliverables allow the data to be used or released for competitive life cycle activities.
Data Rights: Standard License rights for technology developed 100% private expense: Limited Rights (LR), Restricted Rights (RR), or customary commercial license (CCL) for commercial computer software (CCS).	**Data Rights:** Standard License rights for technology developed 100% Government funds or mixed funding: Unlimited Rights (UR), or Government Purpose Rights (GPR), respectively. FFF and OMIT data qualify for UR regardless of funding.
Data Deliverables: No contract requirements for delivery of necessary data or delivered data lacks technical information needed for sustainment or delivered with restriction.	**Data Deliverables:** Must have BOTH a contract requirement to deliver the data; and deliverable data with the level of technical detail necessary for the desired sustainment activity.

Segregation Part II: *The Good News*. The IP Strategy is a tool enabling a program not only to survive, but to thrive, even when the system relies on critical proprietary technologies. The key is the inherent modularity of the system. This solution will be most easily and readily available when using Open Systems Architecture (OSA) approaches to system design. Regardless of the degree to which a system relies on OSA, all complex systems can be organized into subsystems and sub-subsystems (e.g., components or modules), establishing some level of modularity. The better news is that modules which are initially in the Restrictive-Proprietary Model can be transitioned into an Open-Competitive Model through a number of mechanisms. Two options that emphasize alternative approaches for managing the IP are:

- Negotiate for additional IP deliverables (e.g., tech data or computer software) and/or license rights. This is always more cost-effective during competitive phases or environments, usually earlier in the program life cycle.
- Seek delivery of alternative data types, for which standard data rights allow use and release for competitive activities. For example, form, fit, function (FFF) and operation, maintenance, installation, training (OMIT), both qualify for Unlimited Rights (UR) as the standard.

› Guiding Principles for a Strategic Approach to IP Management

Anticipate and plan for sustainment -- and competition -- over the entire system life cycle

- Identify IP deliverables and associated license rights that are necessary for critical sustainment activities, including: re-procurement of additional systems or spares; maintenance and repair at all levels (organizational, intermediate, depot); modification, interfacing, or ensuring interoperability with other systems; capability upgrades; or technology insertion.
- Address uncertainty regarding future sustainment strategies. Consider a competitively priced option (e.g., for data/software delivery, and/or for competitive-use license rights).
- Use a Data Repository approach to ensure that smart planning now will "pay off" in the future.
  - Record information needed to re-use data deliverables, to ensure the ability to use what has already been paid for.
  - Track and validate investments in technology development, both Government and Industry investments.

Align and Integrate the IP Strategy with Other Program Strategies/Plans

The IP Strategy is documented, but cannot be, a "stand alone" strategy. It must be integrated with, and tailored to support, the other program strategies and plans, such as the Acquisition Strategy, the Life Cycle Sustainment Plan, the Configuration Management Plan, the Systems Engineering Plan, etc.

Just Do It: Delivery Now to Ensure Return on Investment (ROI) for DoD-funded development (or prior acquisition)

- Remember: The Open-Competitive Model requires both IP deliverables and the necessary license rights.
- When DoD pays for technology to be developed (or modified or upgraded), this will typically result in:
  - Detailed technical data and computer software being created during the development, and
  - Unlimited, Government Purpose, or other competitive-use license rights granted to the Government.
- This is not a question of whether a program should require delivery of that data/software. When a program has funded development, the program has already paid for the IP to be created.
  - The cost of delivering such pre-existing data/software should be minimal (e.g., have the data delivered in its "native" format if it is not cost-effective to convert to a usual/typical DoD- unique format).
- Securing IP deliverable is "Step 1" to being able to actually use the license rights the program paid for!

But -- Don't make an unnecessary "grab" for deliverables or additional license rights for "Proprietary" IP

- First, make sure that the necessary deliverables, or the necessary license rights, have not already been acquired during a previous development effort or contract. (Use the "Doctrine of Segregability!")
- For "Proprietary" IP (i.e., privately-developed technology), the Government will be required to negotiate to purchase all of the IP deliverables, and their associated license rights, necessary to meet its needs.
- The goal is to establish prices for the deliverables and associated rights during competitive phases of the program (and each individual contract award).
- To address uncertainty regarding DoD needs, use a competitively priced option for IP deliverables or rights.

Before and After: Up-front evaluation and back-end validation of IP deliverables and license rights assertions

- Every source selection should evaluate both data deliverables, and the associated license rights. This includes competitive awards and sole source awards.
- Delivery requirements are the necessary "triggers" to require offerors to assert their specific restrictions.
- When proprietary restrictions are asserted for a system or module, verify the technical segregability of that proprietary element from other DoD-funded (or otherwise open-competitive) elements.
- Upon delivery, inspection and acceptance procedures must include identifying non-conforming or unjustified markings and ensuring that data is delivered in the contract-specified format.

https://acc.dau.mil/IPstrategyguid

IP STRATEGY GUIDANCE

- **The Next Level** (Page 2, cont'd ✉)
  - **It Takes Two:** *Delivery Requirements and IP License Rights*
  - **Time is of the Essence:** *Act Now for Future Flexibility*
  - **Be Prepared:** *"Segregability," Modularity, and Open Systems Architecture*
    - Segregability Part I: *The Bad News*
    - Segregability Part II: *The Good News*
    - Table: the Restricted-Proprietary (R-P) Model and The Open-Competitive (O-C) Model (✉ next slide)

https://acc.dau.mil/IPstrategyguid

IP STRATEGY GUIDANCE

(Conc. of "Be Prepared: 'Segregability, Modularity, & Open Systems Architecture)

- **Approach to managing <u>each "module"</u> (e.g., subsystem, component)**

The Restricted-Proprietary (R-P) Model	The Open-Competitive (O-C) Model
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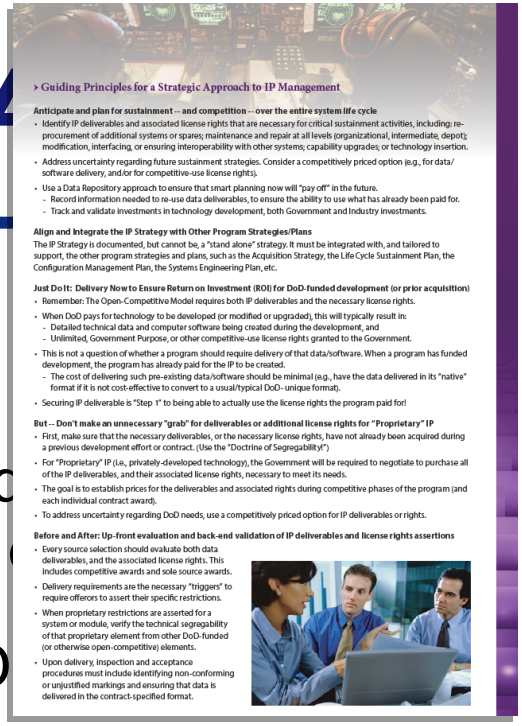
IP STRATEGY GUIDA

- **Guiding Principles for a Strategic Approach to IP Management** (Page 3)
  - Anticipate and plan for sustainment -- and competition -- over the entire system life
  - Align and Integrate the IP Strategy with O Program Strategies/Plans
  - Just Do It: Delivery Now to Ensure Return on Investment (ROI) for DoD-funded development (or prior acquisition)
  - But -- Don't make an unnecessary "grab" for deliverables or additional license rights for “Proprietary” IP
  - Before and After: Up-front evaluation and back-end validation of IP deliverables and license rights assertions



› Guiding Principles for a Strategic Approach to IP Management

Anticipate and plan for sustainment -- and competition -- over the entire system life cycle

- Identify IP deliverables and associated license rights that are necessary for critical sustainment activities, including: re-procurement of additional systems or spares; maintenance and repair at all levels (organizational, intermediate, depot); modification, interfacing, or ensuring interoperability with other systems; capability upgrades; or technology insertion.
- Address uncertainty regarding future sustainment strategies. Consider a competitively priced option (e.g., for data/software delivery, and/or for competitive-use license rights).
- Use a Data Repository approach to ensure that smart planning now will "pay off" in the future.
  - Record information needed to re-use data deliverables, to ensure the ability to use what has already been paid for.
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Align and Integrate the IP Strategy with Other Program Strategies/Plans

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Just Do It: Delivery Now to Ensure Return on Investment (ROI) for DoD-funded development (or prior acquisition)

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But -- Don't make an unnecessary "grab" for deliverables or additional license rights for "Proprietary" IP

- First, make sure that the necessary deliverables, or the necessary license rights, have not already been acquired during a previous development effort or contract. (Use the "Doctrine of Segregability!")
- For "Proprietary" IP (i.e., privately-developed technology), the Government will be required to negotiate to purchase all of the IP deliverables, and their associated license rights, necessary to meet its needs.
- The goal is to establish prices for the deliverables and associated rights during competitive phases of the program (and each individual contract award).
- To address uncertainty regarding DoD needs, use a competitively priced option for IP deliverables or rights.

Before and After: Up-front evaluation and back-end validation of IP deliverables and license rights assertions

- Every source selection should evaluate both data deliverables, and the associated license rights. This includes competitive awards and sole source awards.
- Delivery requirements are the necessary "triggers" to require offerors to assert their specific restrictions.
- When proprietary restrictions are asserted for a system or module, verify the technical segregability of that proprietary element from other DoD-funded (or otherwise open-competitive) elements.
- Upon delivery, inspection and acceptance procedures must include identifying non-conforming or unjustified markings and ensuring that data is delivered in the contract-specified format.

IP STRATEGY GUIDANCE

- **IP Strategy CHECKLIST** – *tactical activities (grouped by contract phase) ✉ to implement, support, and inform the program's IP Strategy* (Page 4)
  - **Pre-planning**
  - **Solicitation & Source Selection; Negotiation**
  - **Contract Performance**
  - **Delivery: Inspection and Acceptance**
  - **The Payoff: Retention and Reuse (and Recordkeeping)**

Intellectual Property Strategy Checklist

Contract Phase	Key IP Management Activities, Considerations, Resources
Pre-planning	☐ Align the initial design studies to the major functional elements ☐ Conduct Market research, including through the Defense Innovation Marketplace ☐ Write a strategy for the system modules that align with the Open-Competitive Model: Technology developed all/part by USG Funding, get delivery of what you're going to pay for (in native format, if it seems too early or costly to reformat the data for DoD's usual standard) ☐ Verify that the strategy includes an approach for the remainder of modules that can be competitively acquired under the Restricted-Proprietary Model: Technology developed entirely at private expense ☐ Verify the IP Strategy accounts for both short-term and long-term needs, covering the full life cycle of the system
Solicitation & Source Selection; Negotiation	☐ Evaluate IP deliverables and license rights as part of source selection and negotiations ☐ Document (within contract) specific up-front delivery requirements for: - Technology being developed under the contract (i.e., you're already paying for it!) - Known requirements for proprietary technology deliverables, when cost-effective ☐ Use (and negotiate) competitively-priced options for IP deliverables for which: - DoD's "need" for the deliverable is dependent on future uncertain events or decisions - When it is not certain whether an up-front purchase is cost-effective ☐ Extend the standard DFARS listing & assertion requirements to commercial technologies, include CDRL requirement for copies of commercial and negotiated licenses ☐ Use the deferred ordering clause (but don't overestimate its power!) ☐ Update the IP Strategy and ensure a life cycle consideration for competition is sustained
Contract Performance	☐ Update Post-award changes to the list of asserted data rights restrictions ☐ Monitor compliance with requirements to report subject inventions ☐ Conduct reviews to verify the data is delivered and complies with the contract requirements - Did the data delivered match the technical/functional requirements of the contract? - Asserted data rights markings (does the marking match up with the list of assertions? ☐ Review the IP Strategy as major development milestones are completed
Delivery: Inspection & Acceptance	☐ Assess Technical compliance (audit or IV&V) ☐ Audit deliverables for Restrictive Markings (recurring) conforming and justified ☐ Invoke withhold payment clause (DFARS 252.227-7030) for non-compliant technical data ☐ Initiate a validation procedure when markings are not justified (i.e., do not accurately describe the DoD's license rights)
The Payoff: Retention and Reuse (and Recordkeeping)	☐ Create a Program or PEO Repository to ensure that the data can be retrieved and [re] used when it is needed later (bonus: transfer to, and reuse by, other programs whenever possible) ☐ Technical/operational needs are the responsibility of the Government. Do not count on industry to act in a way that will ensure they can be competitively replaced ☐ Business/legal needs are the responsibility of your program (e.g., tracking Gov't investment to support challenging IP restrictions/assertions)

https://acc.dau.mil/IPstrategyguid

OVERVIEW

- *Introduction*
- *IP Strategies – from cradle to grave*
- **Modularity, Segregability, and Open Systems Architectures . . . What's the difference?**
- *Evaluating IP in Source Selection*

Note: Additional details in the Backup Slides; plus bonus coverage re "segregation & reintegration" data

[TECH DATA AND COMPUTER SOFTWARE] DELIVERABLES AND RIGHTS AS "ENABLERS"

- **Deliverables ≠ the technical or operational enabler**
  - Supports or enhances one's technical or operational capability to engage in a specific activity
  - The level or degree of support depends on how well the deliverable is tailored to the desired activity (not necessarily just a matter of the level of detail)

- **Rights ≠ the legal or contractual enabler**
  - The ability to *use* the delivered TD or CS for a specific activity, or to *release* to a specific entity (outside the USG/customer) for same
  - Use example: LR data can not be used for manufacture … even by/within the USG
  - Release example: LR data & RR software can be released for emergency repairs, to a "covered Governments support contractor"
    - Coming soon to DFARS: for "segregation or reintegration" activities (Sec. 815 of FY12 NDAA)

- **Question: Which is more important…**
  - …to the contractor/vendor?
  - … to the Government/customer?

Themes from DoD's Better Buying Power (BBP) 2.0 carried over to BBP 3.0

Open Systems Architectures (OSA) [Open/Competitive] **Business Model** **IP Strategy**

- **Legal [Doctrine of] Segregability as applied to the data *rights***
  - Data Rights – licensing necessary to use data/software
  - IP Owner always allowed to segregate his proprietary (developed exclusively at private expense) technology … at the lowest practicable segregable level
  - Rendered meaningless without the data/software deliverable

- **Technical (Operational, Functional . . .) Modularity & OSA**
  - Data Requirements – level of detail needed for specific life cycle activities/purposes
  - Technical Design/Architecture – modular, defined (and open or standard) interfaces between functional systems, subsystems, components

- **Contractual**
  - Data delivery requirements consistent, aligned, supporting the legal segregability and technical modularity
  - Data Rights: Standard DFARS clauses, typical commercial licenses, and negotiated license
  - Challenge: Standard/typical commercial licenses or terms-of-service

- **Overlay: Timing to support an effective and affordable business model**
  - Data delivery/rights needs downstream
  - IP rights allocation at development, design, delivery
  - Competition - organic upstream must be *actively cultivated* later
  - Priced contract options vs. deferred ordering (or delivery)

MODULAR LICENSING (DATA RIGHTS): THE "DOCTRINE OF SEGREGABILITY" (DOS)

- **Noncommercial (N) technical data (TD) or computer software (CS)**
  - **"Source of funds determinations":** for NTD at DFARS 227.7103-4(b); for NCS: 227.7203-4(b)
  - **"Developed exclusively at private expense" definition:** for NTD at DFARS 252.227-7013(a)(8)(i); and for NCS at 252.227-7013(a)(8)(i)

- **Rights determined at the "lowest practical segregable level"**
  - **Hardware: Subsystem, component, or sub-component**
  - **Software: module or even subroutine!**
    - **Real-life example: Individual LINES of code! (an industry assertion)**

- **Modularity/Segregation "At the Clause Level" ✉ DoD-funded modifications to commercial technology** (or DoD-funded technology "becoming," or used in, commercial …)
  - **CTD:** see DFARS 227.7102(a)(1) & (b), referencing 227.7103-6(a)
  - **CCS:** not expressly covered in DFARS, must be addressed during source selections and negotiations – UP-FRONT!

MODULAR LICENSING (DOS) ✉ LEAVING ONE OR MORE PROPRIETARY* MODULE(S)

- **Option 1: Negotiate for "competitive use" –**
  - Data **deliverables** (technical enabler); **and**
  - License **rights** (business/legal enabler)
    - Notice I did not say "GPR" … although GPR will work
    - DoDPR? NavyPR? ProgramPR? SystemSustainmentPR?

- **Option 2: Seek "alternatives" to Option 1 *deliverables* (and the rights will come…)**
  - "Form, fit, and function" (F3 or FFF) data
  - Coming Soon: Segregation & Reintegration Data

***Note:** "Proprietary" used here to denote technology developed exclusively at private expense and/or commercial

PGI 217.7504 ACQUISITION OF PARTS WHEN DATA IS NOT AVAILABLE.

- **PGI 217.7504 Acquisition of parts when data is not available.**

When acquiring a part for which the Government does not have necessary data with rights to use in a specification or drawing for competitive acquisition, use one of the following procedures in order of preference:

(1) When items of identical design are not required, the acquisition may still be conducted through full and open competition by using a performance specification or other similar technical requirement or purchase description that does not contain data with restricted rights. Two methods are—

(i) Two-step sealed bidding; and

(ii) Brand name or equal purchase descriptions.

(2) When other than full and open competition is authorized under FAR Part 6, acquire the part from the firm that developed or designed the item or process, or its licensees, provided productive capacity and quality are adequate and the price is fair and reasonable.

(3) When additional sources are needed and the procedures in paragraph (1) of this section are not practicable, consider the following alternatives:

(i) Encourage the developer to license others to manufacture the parts;

(ii) Acquire the necessary rights in data;

(iii) Use a leader company acquisition technique (FAR Subpart 17.4) when complex technical equipment is involved and establishing satisfactory additional sources will require technical assistance as well as data; or

(iv) Incorporate a priced option in the contract that allows the Government to require the contractor to establish a second source.

(4) As a last alternative, the contracting activity may develop a design specification for competitive acquisition through reverse engineering. Contracting activities shall not do reverse engineering unless—

(i) Significant cost savings can be demonstrated; and

(ii) The action is authorized by the head of the contracting activity.

"Guidelines for Creating and Maintaining a Competitive Environment…" *(21 AUG 14)*

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- *Introduction*
- *IP Strategies – from cradle to grave*
- *Modularity, Segregability, and Open Systems Architectures . . . What's the difference?*

Evaluating IP in Source Selection

Note: Additional details in the Backup Slides; plus bonus coverage re "segregation & reintegration" data

DATA RIGHTS ALLOCATIONS IN SOURCE SELECTIONS

- **DFARS since 1995: offers must list asserted restrictions up-front in proposal … or else**
  - Noncommercial only, must be supplemented for commercial
- **Key #1: Delivery requirement –** no clauses, case by case
  - Trigger for up-front assertion list
- **Key #2: Evaluation factor – data deliverables and data rights**
  - **Legal:** cannot "materially affect source selection" if it's not even an evaluation factor
  - **Practical:** if it is not a discriminator in the source selection … nobody is going to be paying attention
- **But first, the 800lb Gorillas . . .**

THE 800LB GORILLA – (FOR DOD)

- **10 U.S.C. 2320(a)(2)(F):** A [prospective] contractor or subcontractor . . . may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract—
  - (i) to sell or otherwise relinquish to the United States any rights in technical data *except*—
    - **(I) rights in technical data described in subparagraph (A) for which a use or release restriction has been erroneously asserted . . . ;**
    - **(II) rights in technical data described in subparagraph (C); or**
    - **(III) under the conditions described in subparagraph (D); or**
  - (ii) to refrain from offering to use, or from using, an item or process to which the contractor is entitled to restrict rights in data under subparagraph (B).
- **Evaluation expressly authorized:** DFARS: 227.7103-1(c) & (d) (Coverage for NTD); 227.7203-1(c) & (d) (coverage for NCS)

SOURCE SELECTION – THE "MUSTS"

- **Data Deliverable:** the USG must CREATE delivery requirements
  - When in doubt – OPTIONs
  - Priced [option] CLINs (if NSP, then USG will (should) exercise the option regardless)
  - But … watch for Deferred Ordering! (Optional under current FAR & DFARS)

- **Data Rights:** Offeror required to ASSERT restrictions UP-FRONT
  - Standard clause for NONcommercial (DFARS 252.227-7017)
  - USG MUST supplement this requirement for commercial

- **Explanation of the proposal –** Offeror explanation of data rights elements – how delivery/rights affect other aspects of the proposal
  - Renewed interest in "form, fit, and function" data … and coming soon to DoD: "segregation and reintegration data"?

- **Evaluation:** Data/software delivery and rights MUST be evaluated

- **Interest-based negotiations, USG should be flexible … but stand firm on--**
  - Data needed for known requirements
  - Return on Investment (e.g., developed at USG expense may warrant delivery)

WHAT IS NOT PROHIBITED FOR DOD – PART 1

- **Mandatory Delivery Requirements – the statutory restriction directed primarily to RIGHTS**
  - But *policy* restrictions on mandating *commercial* deliverables beyond those typically provided to commercial customers (DFARS 227.7102-1; 227.7202-1)
- **Unlimited Rights in Certain Data Types (¶C): For example--**
  - **OMIT** ✉ data necessary for Operation, Maintenance, Installation, Training
  - **FFF** ✉ Form, Fit, and Function data
- **Right to Release Outside Govt for Special Purposes (¶D): Limited rights includes the authorization to release --**
  - For emergency repair & overhaul,
  - *For segregation & reintegration,*
  - To certain types of support contractors **(2320(c)(2) & (f); *and see* 10 U.S.C. 129d)**
- **Mandatory Minimum Rights Based on Source of Development Funding**
  - 100% Govt $$✉ Unlimited || 100% Private $$ ✉ Limited || Mixed $$ ✉ GPR
- **Voluntary Negotiation for additional rights**

WHAT IS NOT PROHIBITED FOR DOD – PART 2

- **EVALUATION OF DATA RIGHTS.** Prohibition covers only a mandatory condition of responsiveness or award (DFARS 227.7103-10(a)(5) & .7203-10(a)(5))
  - "***Information provided by offerors in response to the solicitation provision may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose technical data.*** However, offerors shall not be prohibited from offering products for which the offeror is entitled to provide the Government limited rights in the technical data pertaining to such products and offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish any greater rights in technical data when the offeror is entitled to provide the technical data with limited rights."

  - **LIFE CYCLE SUPPORT**
    - **Operation & Sustainment without full-open competition ✉ increased cost of future production, support, upgrade**
    - **Risk of parts obsolescence – vanishing supplies/suppliers**

  - **TECHNICAL RISK –** interoperability between proprietary systems

  - **SUBCONTRACTOR/SUPPLIER MANAGEMENT** – identifying and managing proprietary restrictions

Cont'd . . .

  - **NOTE: "open architecture" approach can mitigate these issues**

WHAT IS NOT PROHIBITED FOR DOD – PART 2 (… CONC.)

- **The Tradeoff Process (FAR 15.101-1) – "easier" to**
  - Recognize offers of "additional" or specialized rights (negotiated vs. default)
  - Encourage negotiations for same

- **Lowest Price Technically Acceptable Process (FAR 15.101-2)**
  - Minimum "default" rights could never be "unacceptable" but …
    - **Commercial CS: license rights must also "meet agency needs"**
    - DoD Commercial TD: may require deliverables needed for DoD-unique maintenance needs
  - Some agencies may even : cost realism adjustment in the offered price
  - Allows Govt to accept lesser than default rights, as long as the minimum is specified
    - **This step down may have value to the contractor, allowing a reduction in price, or an offer of greater rights elsewhere to minimize or mitigate effects from lack of competition**

- **Voluntary Negotiation for additional rights**
  - Interest-based negotiations – Government must step up first…
  - Always available – tech data and software, commercial and noncommercial

EVALUATING IP: PERILS & PITFALLS – EMERGING TREND TO [OVER-] EMPHASIZE "GPR"

- **Example: Evaluate Offerors' willingness to provide "at least Government Purpose Rights (GPR)" …**
  - In ALL deliverable tech data & software…
  - … Perhaps as an Option Item (Option CLIN)
  - … Perhaps in combination with an automatic "plus-up" of evaluated cost/price for deliverables with Less Than < GPR

OK – makes sense if (to the extent) …	But raises concerns if (to the extent) …

• The TD/CS deliverables relate to (or are) –
  • Noncommercial items or software
  • Technology developed either with "mixed funding" or 100% Govt $$
• Deliverables are OMIT data, FFF data, or NCSD (default = Unlimited Rts)
• Offeror (and its team) willing to provide GPR (e.g., as specially negotiated license) for the deliverables … at a competitive price
	• TD/CS Deliverables relate to (or are)
	  • Commercial items or commercial CS (CCS)
	  • Segregable modules developed 100% at private expense
	• Deliverables are "detailed manufacturing or process data" (DMPD) or source code
	• Offeror (or offeror' subs/suppliers) is not willing to grant GPR … at a competitive $$

DOD OPEN SYSTEMS ARCHITECTURES CONTRACT GUIDEBOOK FOR PROGRAM MANAGERS *(V1.1, JUN 2013)*

- Chapter I: RECOMMENDATIONS FOR SEC. C DESRIPTION/SPECIFICATIONS STMT. OF WORK OR STMT. OF OBJECTIVES –p. 1
- Chapter II: DEVELOPING CONTRACT LINE ITEM NUMBERS (CLINs) – RESERVED –p. 19
- Chapter III: EXAMPLES OF SECTION H SPECIAL CONTRACT REQUIREMENTS –p. 21
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- Appendix 10: BREAKING AND AVOIDING VENDOR LOCK –p. 167
- Appendix 11: SAMPLE CONTRACT DATA REQUIREMENTS LISTS (CDRLs) –p. 177

SAMPLE RFP LANGUAGE: DOD'S OSA K GUIDE *(V1.1, JUNE 2013)*

- **Ch. V: Recommend's for Sec. M Eval Factors… (pp. 69-76)**
  - Covers both OSA and IP/Data Rights

- **But don't forget – this is only ONE element of a thread that permeates the entire RFP**
  - Section B – CLINs (✉ ref CDRLs)
  - Section C – SoW/PWS
  - Section H – Special Contract Reqts.
  - Section I – Clauses
  - Section J – Attachments (CDRLs; Negotiated and/or commercial licenses)
  - Section K – Reps & Certs
  - Section L – Instructions to Offerors
  - Section M – Eval Factors

OSA GUIDEBOOK – EVALUATION SAMPLES

- **Focuses DR evaluation on** **"…** to assess the extent to which the rights in [(TD), (CS), (CSD)] … offered to the Government ensure unimpeded, innovative, and cost effective production, operation, maintenance, and upgrade of the [*SYSTEM NAME*] throughout its life cycle; allow for open and competitive procurement of [*SYSTEM NAME*] enhancements; and permit the transfer of [*SYSTEM NAME*] TD, CSD and CS to other systems or platforms."

- Note: this is NOT a requirement for GPR (and/or option price for GPR) . . . Although GPR is **one** way to answer the Q

- CCS will be evaluated on the "…their consistency with Federal procurement law and satisfaction of Government user needs in accordance with the policy in DFARS 227.7202-1(a)."

- Offers provided more than minimum rights may be positively impacted

EXAMPLE: OSA CONTRACT GUIDEBOOK … CHAP V – EVALUATION FACTORS

- **Sample #4: Factor: Data Rights, Computer Software Rights and Patent Rights:**

"In evaluating the Data Rights and Patent Rights, the Government will use information in the proposal to assess **the extent to which** the rights in technical data (TD), computer software (CS), computer software documentation (CSD), and inventions/patents offered to the Government [–

(i)] ensure unimpeded, innovative, and cost effective production, operation, maintenance, and upgrade of the [SYSTEM NAME] throughout its life cycle;

[(ii)] allow for open and competitive procurement of [SYSTEM NAME] enhancements; and

[(iii)] permit the transfer of the [SYSTEM NAME] non-proprietary object code and source code to other contractors for use on other systems or platforms."

EXAMPLE: OSA CONTRACT GUIDEBOOK … CHAP V – EVALUATION FACTORS

- **Sample #5: Factor: Data, Software and Patent Rights:**

"The Government will evaluate Data, Software and Patent Rights using information in the proposal to assess the extent to which the rights in Technical Data (TD), Computer Software (CS), Computer Software Documentation (CSD), and inventions/patents offered to the Government [--]

(i)] ensure unimpeded, innovative, and cost effective production, operation, maintenance, and upgrade of the [*SYSTEM NAME*] throughout its life cycle;

[(ii)] allow for open and competitive procurement of [*SYSTEM NAME*] enhancements; and

[(iii)] permit the transfer of [*SYSTEM NAME*] TD, CSD and CS to other systems or platforms.

[Cont'd . . .]

EXAMPLE: OSA CONTRACT GUIDEBOOK … CHAP V – EVALUATION FACTORS

- **… Conclusion of Sample #5: Factor: Data, Software and Patent Rights:**

"Proposals will not be rated as less than ACCEPTABLE on this factor solely because an Offeror does not offer a price for the Government Purpose Rights Option CLIN.

"However, ratings on this factor for proposals to deliver TD, CSD, or SW with less than the minimum rights specified for the Government by applicable statute (10 U.S.C. 2320) and regulation (DFARS 252.227-7013, 252.227-7014, and 252.227-7015) may be negatively impacted. For noncommercial acquisitions, these rights include: Unlimited Rights in TD (as specified in DFARS 252.227-7013(b)(1)) and CS and CSD (as specified in DFARS 252.227-7014(b)(1)); Limited Rights in TD (as specified in DFARS 252.227-7013(b)(3)); and Restricted Rights in CS (as specified in DFARS 252.227-7014(b)(3)). The minimum rights considered for TD associated with commercial item acquisitions are specified in DFARS 252.227-7015(b)(1).

"For commercial SW acquisitions, evaluation of the offered rights will assess their consistency with Federal procurement law and satisfaction of Government user needs in accordance with the policy in DFARS 227.7202-1(a).

"Ratings on this factor for proposals to deliver TD, CSD, or SW with more than the minimum rights specified for the Government by applicable statute and regulation may be positively impacted."

BACKUP SLIDES

THE DFARS DATA RIGHTS "QUAD-CHART"

THIS TYPE OF DATA / RELATED TO THIS TYPE OF ITEM	TECHNICAL DATA (TD) DFARS SUBPART 227.71 (10 USC §§ 2320 & 2321)	COMPUTER SOFTWARE (CS) DFARS SUBPART 227.72 (No specific statutes)
COMMERCIAL ITEMS (CI)	**CTD:** 227.7102 & **252.227-7015** **(But use -7013 for USG-funded parts)**	**CCSD** [1] → **CCS:** 227.7202 & **No clause! (Use the Commercial License (CL))**
NON-COMMERCIAL ITEMS (NI)	**NTD:** 227.7103 & **252.227-7013**	**NCS:** 227.7203 & **252.227-7014**

NOTES:

1. CCSD is NOT treated like (any/every) other type of CTD; CCSD is treated the same as the CCS it relates to
2. All TD or CS must "fit" into one of these four bins – and the bins are mutually exclusive
3. Within each bin –
   A. The governing DFARS Section is listed on top, in black
   B. The "primary rights allocation clause" is below, in bold-red text

BETTER BUYING POWER 3.0 INTERIM RELEASES! (19 SEP 14)

- **The BBP 3.0 *White Paper – summarizing the 3.0 focus areas***
  - ***"****Better Buying Power (BBP) is based on the principle that continuous improvement is the best approach to improving the performance of the defense acquisition enterprise. The evolution from BBP 1.0 to BBP 2.0 was based on the premise that emphasis would shift as initiatives were put in place, experience was accumulated, data was collected and analyzed, and conditions changed. BBP 3.0 continues that approach with a shift in emphasis toward achieving dominant capabilities through innovation and technical excellence.****"***

- **BBP 3.0 Presentation by Frank Kendall USD(AT&L)**
  - **BBP 2.0 activities – "color coded"** re continuation in BBP 3.0
  - **BBP 3.0 DRAFT -** *Achieving Dominant Capabilities through Technical Excellence and Innovation*
  - **Seeking feedback –** see the website and join the conversation at osd.atl.bbp@mail.mil

http://bbp.dau.mil/

EXCERPT: BBP 2.0 TRANSITIONING TO BBP 3.0

Better Buying Power 2.0

A Guide to Help You Think

Achieve Affordable Programs
- Mandate affordability as a requirement
- Institute a system of investment planning to derive affordability caps
- Enforce affordability caps

Control Costs Throughout the Product Lifecycle
- Implement "should cost" based management
- Eliminate redundancy within warfighter portfolios
- Institute a system to measure the cost performance of programs and institutions and to assess the effectiveness of acquisition policies
- Build stronger partnerships with the requirements community to control costs
- Increase the incorporation of defense exportability features in initial designs

Incentivize Productivity & Innovation in Industry and Government
- Align profitability more tightly with Department goals
- Employ appropriate contract types
- Increase use of Fixed Price Incentive contracts in Low Rate Initial Production
- Better define value in "best value" competitions
- When Lowest Price Technically Acceptable is used, define Technically Acceptable to ensure needed quality
- Institute a superior supplier incentive program
- Increase effective use of Performance-Based Logistics
- Reduce backlog of DCAA Audits without compromising effectiveness
- Expand programs to leverage industry's IR&D

Eliminate Unproductive Processes and Bureaucracy
- Reduce frequency of higher headquarters level reviews
- Re-emphasize AE, PEO and PM responsibility, authority, and accountability
- Reduce cycle times while ensuring sound investment decisions

Promote Effective Competition
- Emphasize competition strategies and create and maintain competitive environments
- Enforce open system architectures and effectively manage technical data rights
- Increase small business roles and opportunities
- Use the Technology Development phase for true risk reduction

Improve Tradecraft in Acquisition of Services
- Assign senior managers for acquisition of services
- Measure productivity using the uniformed services market segmentation
- Improve requirements definition/prevent requirements creep
- Increase small business participation, including through more effective use of market research
- Strengthen contract management outside the normal acquisition chain – installations, etc.
- Expand use of requirements review boards and tripwires

Improve the Professionalism of the Total Acquisition Workforce
- Establish higher standards for key leadership positions
- Establish increased professional qualification requirements for all acquisition specialties
- Increase the recognition of excellence in acquisition management
- Continue to increase the cost consciousness of the acquisition workforce – change the culture

Complete

Continue in 3.0 without specific emphasis

Continue in 3.0 without change, or some mods

For additional information: http://bbp.dau.mil

BETTER BUYING POWER 2.0
PROMOTING EFFECTIVE COMPETITION FOR THE LIFE CYCLE

http://bbp.dau.mil/

Enforce open system architectures and effectively manage technical data rights:

This item is continued from BBP 1.0 and will focus on improving the Department's early planning for open architectures and the successful execution of the plan to provide for open architectures and modular systems. This will include the **development of a business model and associated intellectual property strategy** (data rights planning) that can be implemented over the lifecycle of the product, starting while

DFARS 207.106 - ADDITIONAL REQUIREMENTS FOR MAJOR SYSTEMS

- (b)(1)(A) The contracting officer is prohibited by 10 U.S.C. 2305(d)(4)(A) from requiring offers for development or production of major systems that would enable the Government to use technical data to competitively reprocure identical items or components of the system if the item or component were developed exclusively at private expense, unless the contracting officer determines that—
  - *(1)* The original supplier of the item or component will be unable to satisfy program schedule or delivery requirements;
  - *(2)* Proposals by the original supplier of the item or component to meet mobilization requirements are insufficient to meet the agency's mobilization needs; or
  - *(3)* The Government is otherwise entitled to unlimited rights in technical data.
- (B) If the contracting officer makes a determination, under paragraphs (b)(1)(A)*(1)* and *(2)* of this section, for a competitive solicitation, 10 U.S.C. 2305(d)(4)(B) requires that the evaluation of items developed at private expense be based on an analysis of the total value, in terms of innovative design, life-cycle costs, and other pertinent factors, of incorporating such items in the system.

- (S-70)(1) In accordance with Section 802(a) of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364) and DoD policy requirements, acquisition plans for major weapon systems and subsystems of major weapon systems shall—
  - (i) Assess the long-term technical data and computer software needs of those systems and subsystems; and
  - (ii) Establish acquisition strategies that provide for the technical data deliverables and associated license rights needed to sustain those systems and subsystems over their life cycle. The strategy may include—
    - (A) The development of maintenance capabilities within DoD; or
    - (B) Competition for contracts for sustainment of the systems or subsystems.
  - (2) Assessments and corresponding acquisition strategies developed under this section shall—
  - (i) Be developed before issuance of a solicitation for the weapon system or subsystem;
  - (ii) Address the merits of including a priced contract option for the future delivery of technical data and computer software, and associated license rights, that were not acquired upon initial contract award;
  - (iii) Address the potential for changes in the sustainment plan over the life cycle of the weapon system or subsystem; and
  - (iv) Apply to weapon systems and subsystems that are to be supported by performance-based logistics arrangements as well as to weapon systems and subsystems that are to be supported by other sustainment approaches.
- (S-71) See 209.570 for policy applicable to acquisition strategies that consider the use of lead system integrators

DODI 5000.02 – SELECTED EXCERPTS: IP & OSA

- **Encl. 1 – Acq. Categories & Compliance Reqts, Table 2 Milestone & Phase Information Req'ts (Cont. p. 48)**

Table 2. Milestone and Phase Information Requirements, continued

INFORMATION REQUIREMENT	PROGRAM TYPE[1]				LIFE-CYCLE EVENT[1,2,3]								SOURCE	APPROVAL AUTHORITY
	MDAP	MAIS	ACAT II	ACAT ≤III	MDD	MS A	CDD Val	Dev RFP Rel	MS B[5]	MS C	FRP/FD Dec	OTHER		
* * * * *														
ACQUISITION STRATEGY	•	•	●	●		•		•		✓	✓		SEC. 803, P.L. 107-314 (Ref. (i)) Para. 6a of Enc. 2 of this instruction	MDA
STATUTORY for MDAPs at Milestone A; Regulatory for all other program types at all marked events including MDAPs after Milestone A. The Acquisition Strategy will include STATUTORY and Regulatory information. Major changes to the plan reflected in the Acquisition Strategy require MDA approval. The following STATUTORY requirements will be satisfied in the Acquisition Strategy:														
* * * * *														

ACQUISITION STRATEGY, continued

* * * * *

- INTELLECTUAL PROPERTY (IP) STRATEGY: STATUTORY for major weapon systems and subsystems; Regulatory for other program types. The IP Strategy must be updated as appropriate to support and account for evolving IP considerations associated with the award and administration of all contracts throughout the system life cycle. Becomes part of the Life-Cycle Sustainment Plan (LCSP) during Operations and Support (O&S). For programs responding to urgent needs, due at the Development Milestone. SOURCE(S): 10 U.S.C. 2320 (Ref. (g)), Para. 6a(4) of Enclosure 2 of this instruction

Table Notes:

1. A dot (●) in a cell indicates the specific applicability of the requirement to program type and life-cycle event, and represents the initial submission requirement. Moving right across a row, a checkmark (✓) indicates the requirement for updated information.
2. All of the "Life-Cycle Events" will not necessarily apply to all "Program Types."
3. Unless otherwise specified when discussed in this instruction, documentation for identified events will be submitted no later than 45 calendar days before the planned review.
4. Requires a Program Manager-, PEO-, and CAE-approved draft.
5. Information requirements that have been finalized and approved by the responsible authority in support of the Development RFP Release Decision Point do not have to be re-submitted prior to Milestone B unless changes have occurred. In that case, updated documents will be provided.
6. Incrementally Deployed Software Intensive Programs (Model #8) do not have a Milestone C and consequently are not required to satisfy the Table 2 requirements associated with that milestone.

DODI 5000.02 – SELECTED EXCERPTS: IP & OSA

- **Encl. 2 – Program Mgmt, ¶ 6. Program Mgmt Responsibilities, ¶a. Acquisition Strategies, ¶(4): (p. 76)**

(4) Intellectual Property (IP) Strategy and Open Systems Architectures. Program management must establish and maintain an IP Strategy to identify and manage the full spectrum of IP and related issues (e.g., technical data and computer software deliverables, patented technologies, and appropriate license rights) from the inception of a program and throughout the life cycle. The IP Strategy will describe, at a minimum, how program management will assess program needs for, and acquire competitively whenever possible, the IP deliverables and associated license rights necessary for competitive and affordable acquisition and sustainment over the entire product life cycle, including by integrating, for all systems, the IP planning elements required by subpart 207.106 (S-70) of the Defense Federal Acquisition Regulation Supplement (Reference (al)) for major weapon systems and subsystems thereof. The IP Strategy will be updated throughout the entire product life cycle, initially as part of the Acquisition Strategy, and during the Operations and Support Phase as part of the Life-Cycle Sustainment Plan. Program management is also responsible for evaluating and implementing open systems architectures, where cost effective, and implementing a consistent IP Strategy. This approach integrates technical requirements with contracting mechanisms and legal considerations to support continuous availability of multiple competitive alternatives throughout the product life cycle.

DODI 5000.02 – SELECTED EXCERPTS: IP & OSA

- **Encl. 3 – Systems Engineering, ¶ 14 (@ p. 85)**

14. OPEN SYSTEMS ARCHITECTURES. Program managers are responsible for applying open systems approaches in product designs where feasible and cost-effective. Open systems and modular architectures provide valuable mechanisms for continuing competition and incremental upgrades, and to facilitate reuse across the joint force. Program management will use open systems architecture design principles to support an open business model (see paragraph 6a(4) in Enclosure 2 of this instruction).

DODI 5000.02 – SELECTED EXCERPTS: IP & OSA

- **Encl. 6, ¶ 2.a.(1)(a)5 & 6 (@ p. 112)**

ENCLOSURE 6
LIFE-CYCLE SUSTAINMENT

* * * * *

2. SUSTAINMENT ACROSS THE LIFE CYCLE. Sustainment planning… must be an integral element of the capability requirements and acquisition process from inception.

a. The Program Manager, with the support of the Product Support Manager (PSM), will:

(1) Develop and implement an affordable and effective performance-based product support strategy. The product support strategy will be the basis for all sustainment efforts and lead to a product support package to achieve and sustain warfighter requirements.

(a) The product support strategy will address, at a minimum:

* * * * *

5. The necessary intellectual property (IP) deliverables and associated license rights, consistent with and integrated with the program IP Strategy. Paragraph 6a(4) in Enclosure 2 of this instruction details IP policy.

6. How and when computer software and computer software documentation (as defined in Defense Federal Acquisition Regulation Supplement (Reference (al)) section 252.227- 7014) and other material and activities required to maintain and sustain the software after Initial Operational Capability (IOC) will be provided to the government for systems that require core logistics support or when depot level software maintenance is required. Paragraph 3d(2) in this enclosure addresses core logistics requirements.

DODI 5000.02 – SELECTED EXCERPTS: IP & OSA

- **Encl. 6, ¶ ¶3.d.(4) (p.116):**

ENCLOSURE 6
LIFE-CYCLE SUSTAINMENT

* * * * *

3. LIFE-CYCLE SUSTAINMENT PLAN (LCSP). Program managers for all programs are responsible for developing and maintaining an LCSP consistent with the product support strategy, beginning at Milestone A. The plan will describe sustainment influences on system design and the technical, business, and management activities to develop, implement, and deliver a product support package that maintains affordable system operational effectiveness over the system life cycle and seeks to reduce cost without sacrificing necessary levels of program support. The Acquisition Strategy will also include an overview of the product support strategy and sustainment-related contracts.

* * * * *

d. The LCSP will include the following annexes:

MODULAR LICENSING / SEGREGABILITY … "AT THE CLAUSE LEVEL"

- **Selected Excerpt: DFARS 227.7102-4 Contract clauses.**

"(a)(1) Except as provided in paragraph (b) of this subsection, use the clause at 252.227-7015, Technical Data–Commercial Items, in all solicitations and contracts when the contractor will be required to deliver technical data pertaining to commercial items, components, or processes. (2) * * * * *.

"(b) In accordance with the clause prescription at 227.7103-6(a), use the clause at 252.227-7013, Rights in Technical Data–Noncommercial Items, ***in addition to*** the clause at 252.227-7015, if the Government will have paid for any portion of the development costs of a commercial item. The clause at 252.227-7013 will govern the technical data ***pertaining to any portion*** of a commercial item that was developed in any part at Government expense, and the clause at 252.227-7015 will govern the technical data ***pertaining to any portion*** of a commercial item that was developed exclusively at private expense."

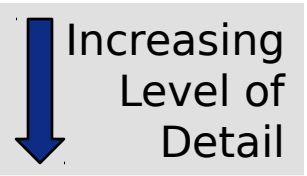
- **Selected Excerpt: DFARS 227.7103-6(a) Contract clauses.**

Use …252.227-7013 … when the successful offeror(s) will be required to deliver … [TD] pertaining to noncommercial items, or pertaining to commercial items for which the Government will have paid for any portion of the development costs (in which case …252.227-7013 will govern the [TD] ***pertaining to any portion*** of a commercial item that was developed in any part at Government expense, and …252.227-7015 will govern the [TD] ***pertaining to any portion*** of a commercial item that was developed exclusively at private expense).

- **Question 1: Does this affect the commercial status of the item?**
  - **NO!** This affects only the license rights granted to DoD
- **Question 2: Does this apply to commercial SOFTWARE too?**
  - **Not expressly** … although available by analogy, negotiation, etc.

DETERMINING AND SPECIFYING DATA & SOFTWARE DELIVERY REQUIREMENTS…

- **Noncommercial: TD - 227.7103-1 & -2; CS - 227.7103-1**
- **Commercial: TD – 227.7102-1; CS 227.7202-**
- **As a practical matter -- data needed for**
  - **Data type (nature, format, level of detail) needed for specific downstream activities or "purposes"**
    1) "OMIT" (operation, maintenance, installation, or training)
    2) Modification & technology insertion/upgrade
    3) Production/manufacturing → "detailed manufacturing or process data" (DMPD)



  - **FFF (form, fit, and function) as the generic alternative**
  - **Coming soon to a DoD near you? "Segregation & reintegration data"**

Cont'd.

DETERMINING AND SPECIFYING DATA & SOFTWARE DELIVERY REQUIREMENTS… Cont.

- **DoD Instruction 5000.02, "Operation of the Defense Acquisition System," 07 Jan 15**
  - IP Strategy (IPS) required throughout entire program life cycle (see Encl.1 Table 2 (p.48); Encl 2, ¶ 6.(a)(4) (p.76))
  - Requires the IP acquisition planning elements of DFARS 207.106 (S-70) for ALL systems
  - OSA required when feasible & cost-effective; w/IPS support an "open business model" (Encl. 3, ¶14 (p.86))
  - Product support strategy must be consistent/integrated with IPS (Encl. 6, ¶2.a.(1)(a)5. (p.112); & ¶3.d.(4) (p.116))

- **DoD Instruction 5010.12-M, "Procedures for the Acquisition and Management of Technical Data," 14 May 93**
  - Being updated now as part of DoD's "Better Buying Power 2.0" family of initiatives (see backup slides 53-66)

- **The "ASSIST" database – source for DoD specifications & standards – including Data Item Descriptions (DIDs) to describe TD/CS deliverables**
  - Public documents available to all: http://quicksearch.dla.mil/

- **Under Secretary of Defense for Acquisition, Technology , and Logistics, "DoD Open Systems Architecture Contract Guidebook for Program Managers," v.1.1., June 2013** (see https://acc.dau.mil/OA)
  - **Appendix 1, "Recommended CDRL and Deliverable Items" (pp. 83-95)**

- **Conformity, Acceptance, and Warranty of TD/CS**
  - FAR 27.406-3, Major System Acquisition – prescribes clause 52.227-21 "[TD] Declaration, Revision, and Withholding of Payment—Major Systems," – allows withholding of the lesser of $100K or 5% of contract price pending correction of nonconforming TD

BONUS!

On the Horizon: New Deferred Ordering & Segregation / Reintegration Data

FY 2012 NDAA – SECTION 815: "RIGHTS IN TECHNICAL DATA AND VALIDATION OF PROPRIETARY DATA RESTRICTIONS"

- **New "Type" of Data: Necessary for Segregation & Reintegration**
  - **Details in slides to follow ✉**
- **Expanded (and restricted) Deferred Ordering scheme**
  - **Details in slides to follow ✉**
- **Validation of Asserted Restrictions**
  - **Challenge period is now 6 years after contract (current = 3yrs)**
  - **No time limit for assertions based on fraud**
- **Housekeeping**
  - **Government Purpose Rights (GPR) is default for mixed funding**
  - **Repeal FY11 § 824's attempted slaughter of IR&D rules**

FY 2012 NDAA – SECTION 815, "RIGHTS IN TECHNICAL DATA AND VALIDATION OF PROPRIETARY DATA RESTRICTIONS"

- **Paragraph (a) – *Rights in Technical Data.* Amends 10 U.S.C. § 2320 as follows:**
  - **Segregation/Reintegration Data.** New ¶ (a)(2)(D)(i)(II) authorizes TD "necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes" (hereafter segregation/reintegration data), to be released outside the Government even if it was developed exclusively at private expense.
  - **GPR.** Revise ¶ (a)(2)(E) to expressly recognize that the Government will have government purpose rights (GPR) in data related to technology developed with mixed funds, except when negotiated otherwise
  - **IR&D.** Retroactively reverses in its entirety the changes to paragraph (a)(3) made by § 824(b) of the FY2011 NDAA (above), restoring the long-standing rule that IR&D and B&P are treated as private expense.
  - **Deferred Ordering. N**ew (b)(9), authorized USG to order, at any time after award, certain types of technical data that are determined to be necessary for the "reprocurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or process." Covers data related to technology developed in whole or in part with Government funds, and to segregation/reintegration data.
  - New (b)(10), which provides that the Government is "not foreclosed from requiring the delivery of the technical data by a failure to challenge, in accordance with the requirements of [10 U.S.C. § 2321(d)], the contractor's assertion of a use or release restriction on the technical data."
- **Paragraph (b) – *Validation of Proprietary Data Restrictions.*** Amends § 2321(d)(2) to change the challenge period from 3 years to 6 years, and to expand the scenarios in which there is no time limit on challenges to include "are the subject of a fraudulently asserted use or release restriction.".
- **DFARS Case 2012-D022, *Rights in Technical Data and Validation of Proprietary Data Restrictions*,** initiated on January 11, 2012, to implement these new changes

SEGREGATION/REINTEGRATION DATA

1) New exception to the prohibition against disclosure outside USG of proprietary data (*i.e.*, data related to technology developed 100% at private expense)

- Along with "***emergency repair & overhaul***". . .
- **Purpose of Release**: only for segregation/reintegration
- **Implied Data Type**: necessary for S/R
- **Procedural**: notice to data owner & NDA for recipient

2) Included in the expanded Deferred Ordering scheme

- ONLY data type for which development funding is irrelevant
- No change to applicable license rights (e.g., Limited Rights)
- Compensation only for converting & delivering in required form

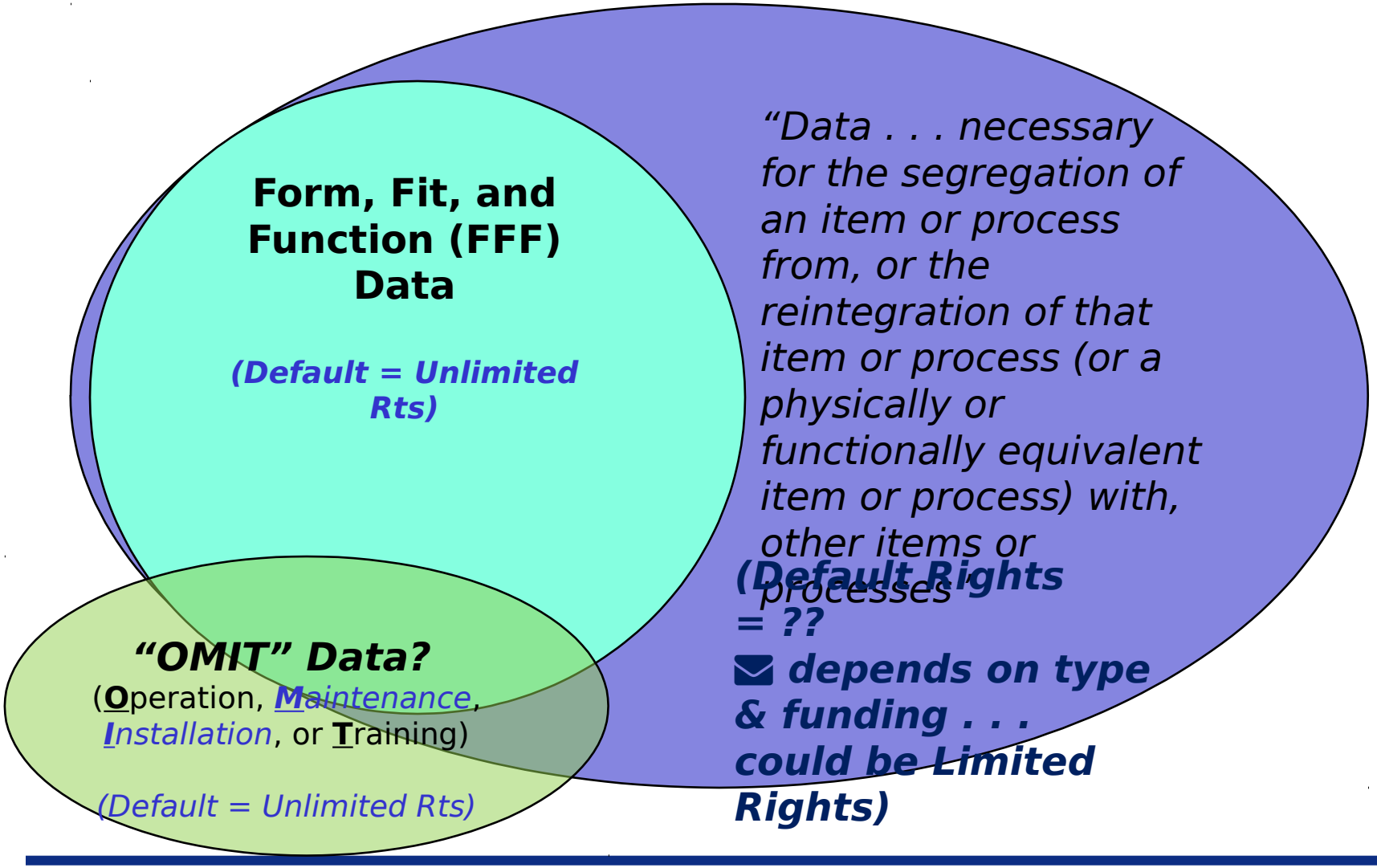
SO, WHAT IS . . . SEGREGATION OR REINTEGRATION DATA?

- **SEGREGATION OR REINTEGRATION DATA:**
  - **". . .** is **necessary for** the segregation of an item or process from, or the reintegration of that item or process (or a **physically or functionally equivalent** item or process) with, other items or processes**"** (10 U.S.C. § 2320 (a)(2)(D)(i)(II), and (b)(9)(B)(ii))

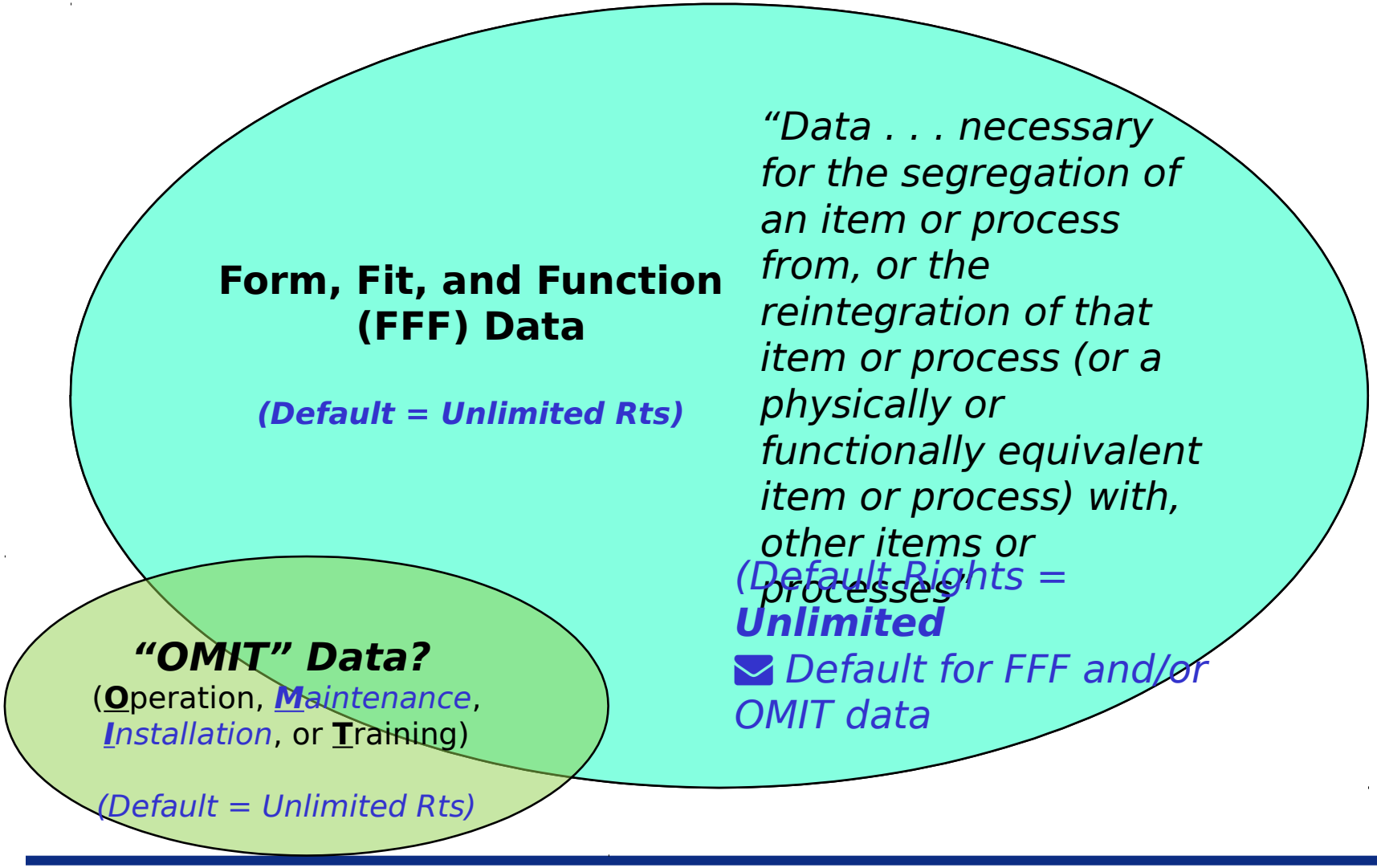
- **FORM, FIT, AND FUNCTION DATA:**
  - **DFARS: ". . .** data that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of **physically and functionally interchangeable** items." (DFARS 252.227-7013(a)(11))
  - **FAR: "…** data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size, **configuration, mating, and attachment** characteristics, functional characteristics, and performance requirements. For **computer software** it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software.**"** (FAR 52.227-14(a))

- **"OMIT" DATA:**
  - **". . . necessary for [O]**peration, **[M]**aintenance, **[I]**nstallation, **or [T]**raining (***other than detailed manufacturing or process data***)" (10 U.S.C. § 2320 (a)(2)(C)(iii))

BRAINSTORMING . . .


Form, Fit, and Function (FFF) Data
(Default = Unlimited Rts)
"Data . . . necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes"
(Default Rights = ??
depends on type & funding . . . could be Limited Rights)
"OMIT" Data?
(Operation, Maintenance, Installation, or Training)
(Default = Unlimited Rts)

IN SOME CASES. . .


Form, Fit, and Function (FFF) Data
(Default = Unlimited Rts)
"Data . . . necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes"
(Default Rights = Unlimited
Default for FFF and/or OMIT data
"OMIT" Data?
(Operation, Maintenance, Installation, or Training)
(Default = Unlimited Rts)

IN OTHER CASES . . .

Form, Fit, and Function (FFF) Data

(Default = Unlimited Rts)

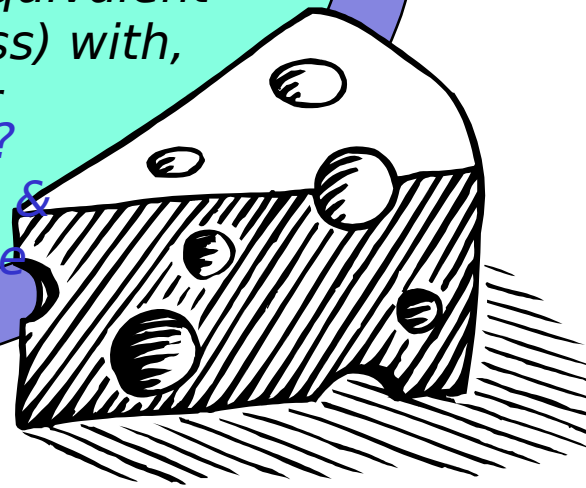
"Data . . . necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes"

"OMIT" Data?

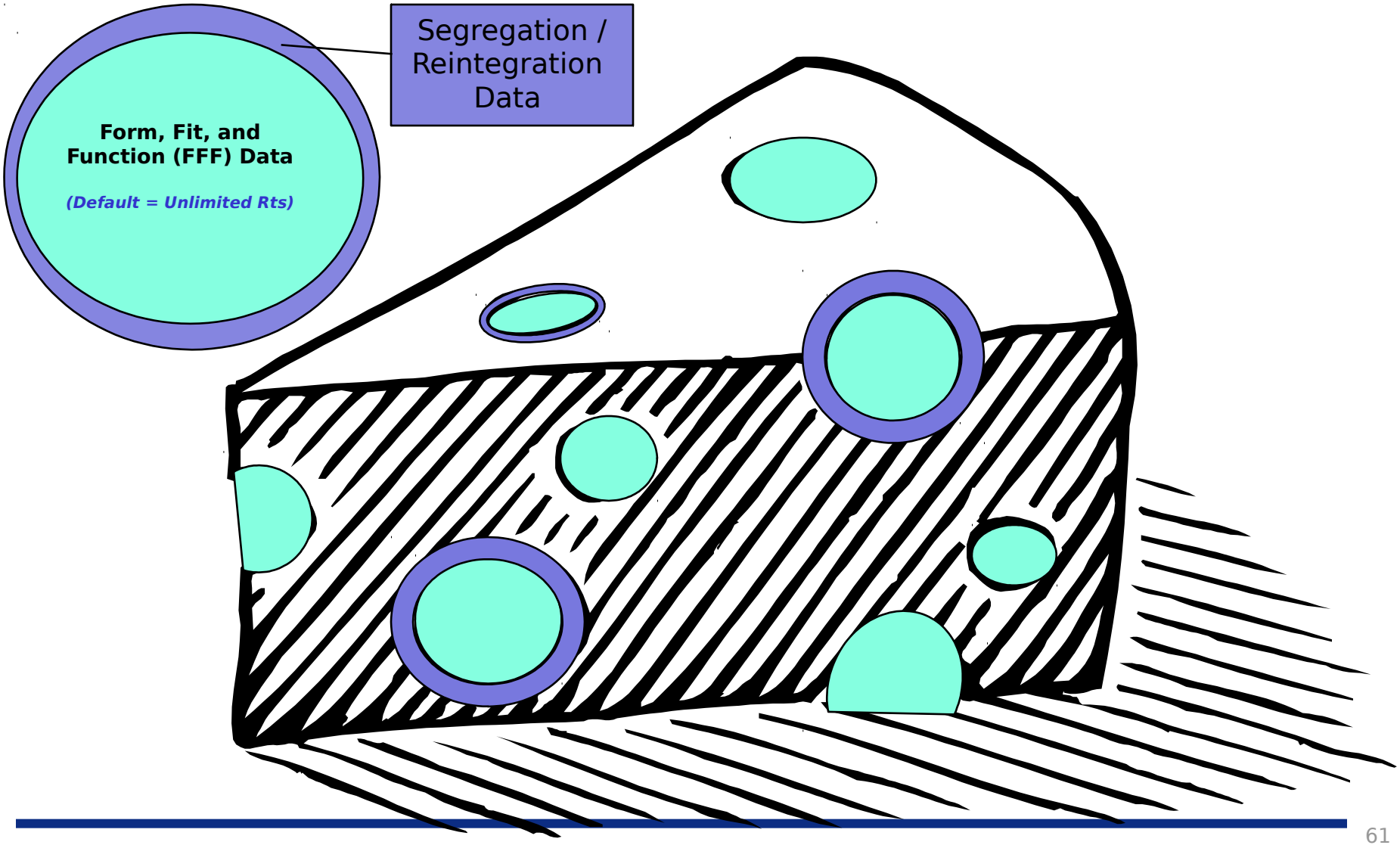
(**O**peration, ***M****aintenance*, ***I****nstallation*, or **T**raining)

(Default = Unlimited Rts)

(Default Rights = ??
depends on type & funding . . . could be Limited Rights)



A SOLUTION FOR THE SWISS CHEESE SYNDROME?



FY12 NDAA – SECTION 815 – DEFERRED ORDERING "PLUS" . . . AND "MINUS"?

- **DEFERRED ORDERING – new par (b)(9) added to 10 U.S.C. § 2320**

‘‘(9) providing that, in addition to technical data that is already subject to a contract delivery requirement, the United States may require *at any time* the delivery of technical data that has been generated *or utilized in the performance of a contract*, and *compensate* the contractor *only* for reasonable costs incurred for having converted and delivered the data in the required form, upon a **determination** that—

‘‘(A) the technical data is needed for the purpose of reprocurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or process; **AND**

‘‘(B) the technical data—

‘‘(i) pertains to an item or process developed in whole or in part with Federal funds; **OR**

‘‘(ii) is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes;’’

DEFERRED ORDERING – CURRENT DFARS 252.227-7027

- **Use the Clause --** "… when a firm requirement for a particular data item(s) has not been established prior to contract award but there is a potential need for the data." **(227.7103-8(b), 227.7203-8(b))**

- **Deferred Ordering of Technical Data Or Computer Software (APR 1988):**
  - "In addition to technical data or computer software specified elsewhere in this contract to be delivered hereunder, the Government may, at any time during the performance of this contract or within a period of **three (3) years after acceptance of all items** (other than technical data or computer software) to be delivered under this contract or the termination of this contract, order any technical data or computer software **generated in the performance** of this contract or any subcontract hereunder.
  - "When the technical data or computer software is ordered, the Contractor shall be **compensated for** converting the data or computer software into the prescribed form, for reproduction and delivery.
  - "The obligation to deliver the technical data of a **subcontractor and pertaining to an item obtained from him shall expire three (3) years after the date the Contractor accepts the last delivery of that item from that subcontractor** under this contract.
  - "The Government's rights to use said data or computer software shall be pursuant to the "Rights in Technical Data and Computer Software" clause of this contract."

DEFERRED ORDERING – SEC. 815

- **Prescription: mandatory, or optional?**
  - **"Regulations … *shall* require that, *whenever practicable*, a contract …"** (pre-existing language at 2320(b))
  - **Current DFARS 252.227-7027: entirely optional**

- **No time limit – "at any time"**
  - **Current -7027 clause: limit is 3yrs after contract**

- **Data generated "or utilized" under the contract**
  - **Current -7027 clause ✉ only if "generated" under the contract**

- **DoD must determine that the data meets BOTH of the following:**
  1) **Necessary for reprocurement, sustainment, modification, or upgrade of a major/weapon/noncommercial system, AND**
  2) **Is either:**
     - **Development funded in whole or in part by the Govermment –OR–**
     - **Necessary for segregation or reintegration**

QUESTIONS – PRACTICAL AND OTHERWISE

- **Is it realistic to plan to "break out" sustainment activities at subsystem/component level?**
- **What contractual mechanisms can we use *now* to allow for competitive pricing for needs that arise > 5 or 10 years later?**
- **Why would the USG *not* always require immediate delivery of data/software dev'd at USG expense?**
- **How can these best practices be applied to "legacy" programs?**
- **What contractual, legal, and practical tools are available to address licensing challenges arising from 3rd party technology?**